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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

EMMA BERNADETTE VALDEZ,

Defendant and Appellant.

B208814

(Los Angeles County
Super. Ct. No. YA061254)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Lori Ann Fournier, Judge. Affirmed.

Jeanine G. Strong, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,
Susan Sullivan Pithey and Chung L. Mar, Deputy Attorneys General, for Plaintiff
and Respondent.

Emma Bernadette Valdez appeals from the judgment entered after this court, in case number B196142, vacated a previous sentence and remanded the matter for resentencing. Appellant had been convicted of eight felonies, seven counts of drug-related offenses, and one count of car theft. In addition, the jury found, on three occasions appellant was out of custody on bail when she committed the felonies within the meaning of Penal Code section 12022.1. In the previous opinion, we concluded the trial court properly imposed three on-bail enhancements but that imposition of the upper term as to count 4 (the conviction on April 21, 2005, for possession of methamphetamine while armed) was prejudicial error under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*). We remanded for resentencing ““in a manner consistent with the amendments to the DSL¹ adopted by the Legislature,’ and guided by the sentencing rules amended to conform to the current version of the DSL.” Appellant now contends the trial court failed to follow this court’s instructions on resentencing and again considered improper factors to impose the upper term sentence. She also claims she received ineffective assistance of counsel. For reasons stated in the opinion, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Appellant was convicted in count 1 of possession of methamphetamine, committed on March 20, 2005 (Health & Saf. Code, § 11378); in count 2 of possession of marijuana for purposes of sale, committed on May 4, 2005 (Health & Saf. Code, § 11359); in count 3, possession of hydrocodone, committed on May 4, 2005 (Health & Saf. Code, § 11350); in count 4 of possession of methamphetamine while armed with a loaded, operable firearm, committed on April 21, 2005 (Health & Saf. Code, § 11370.1, subd. (a)); in count 5, possession of methamphetamine, committed on April 21, 2005 (Health & Saf. Code, § 11377, subd. (a)); in count 6 of unlawful driving or taking a vehicle, committed on April 21, 2005 (Veh. Code § 10851, subd. (a)); in count 8

¹ Determinate Sentencing Law.

maintenance of a place intended for sale of methamphetamine, committed on January 4, 2006 (Health & Saf. Code, § 11366); and in count 9 of possession for sale of methamphetamine, committed on January 4, 2006 (Health & Saf. Code, § 11378). Additionally, the jury found that appellant committed counts 2 and 3 while on bail after her arrest on April 21, 2005; that appellant committed counts 4, 5, and 6 while on bail after her arrest on March 20, 2005; and that she committed counts 8 and 9 while on bail after her arrest on May 4, 2005.

Appellant was resentenced to a total of 14 years in prison, consisting of in count 4 the upper term of four years and in six of the remaining counts, one-third the middle term, or eight months, consecutive. The term for count 9 was ordered stayed pursuant to Penal Code section 654. The on-bail enhancements as to counts 3, 5, 6, and 9 were stricken, and the two-year on-bail enhancements on counts 2, 4, and 8 were imposed.

At resentencing, the trial court explained its reasons for imposing the upper term on count 4 as follows: “Based on the current state of the law, the court does have the discretion to impose the low term, the mid term, or the upper term depending on the facts and circumstances of the case. [¶] In this particular case there were so many different incidents, and the behavior of [appellant] . . . was a progression that continued to become more sophisticated; it continued to become more serious, her involvement went from . . . being in a car with some contraband to being at another location, being in her house where search warrants were served on a number of occasions, and the planning and sophistication that was shown from the beginning when it was just her pager going off repeatedly, to the final arrest where she had cameras throughout the exterior of the home. There were scanners that were tuned into [sic] the police department to monitor their activity, and the fact that there were a number of out on bail allegations that were imposed or stayed or stricken by me because of the various offenses. . . . So in consideration of all of the factors that were stated, and what the jury heard, the evidence that was presented, I think that the high term of four years for count 4 is appropriate. I struck the out on bail allegations, but there were multiple ones that the jury found true that could be considered and used by me to impose the high term. And again, the

progression of criminal sophistication, which was part of the reason that I imposed the high term initially, I think that for all of those reasons that the high term is still appropriate and the sentence should remain at 14 years.”

DISCUSSION

Appellant contends the trial court failed to follow this court’s instructions on resentencing and again considered improper factors to impose the upper term sentence in violation of *Cunningham*. She asserts the trial court erred by relying on the improper factor of “planning, sophistication and professionalism” to impose the upper term in that the factor had not been charged and had not been found by a jury. She additionally contends the court erred in using the stricken on-bail enhancements to justify the upper term because the trial court was required to strike the enhancements as to counts 3, 5, 6, and 9. Under Penal Code section 12022.1, a defendant’s sentence may be enhanced only if he or she commits a felony (a secondary offense) while on bail for another felony (a primary offense) and only one enhancement for each primary offense is permitted. Appellant claims a stricken enhancement cannot serve as a factor in aggravation.

After *Cunningham*, however, and before appellant was resentenced, the Legislature amended Penal Code section 1170 to provide in relevant part, “(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the probation officer’s report, other reports . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court’s discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. . . .”

On July 19, 2007, the California Supreme Court in *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), concluded it was appropriate to proceed under the provisions adopted by the Legislature on those cases remanded for resentencing. Appellant was not resentenced under the sentencing scheme found unconstitutional, and the court's resentencing of appellant, on May 22, 2008, in compliance with the amended statute and *Sandoval*, did not violate her constitutional rights under *Cunningham*.² (See *People v. Wilson* (2008) 164 Cal.App.4th 988, 992.)³

To the extent appellant is claiming the trial court abused its discretion in imposing the upper term, the claim is without merit. "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citations.] Second, a "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) Here, the court struck the on-bail enhancements as to counts 3, 5, 6, and 9, and the facts which formed the bases of these enhancements were properly used as a reason for imposing the upper term. (See Cal. Rules of Court, rule 4.420(c).)⁴

² Apart from the inapplicability of *Cunningham* to the instant case, the jury found the stricken enhancements true beyond a reasonable doubt.

³ Appellant's reliance on *People v. Lincoln* (2007) 157 Cal.App.4th 196, 205-206 is faulty as that case involved an enhancement that was punishable by one of three terms, which is not the situation here.

⁴ California Rules of Court, rule 4.420(c) provides, "To comply with [Penal Code] section 1170(b), a fact charged and found as an enhancement may be used as a reason for

In appellant's reply brief, she argues the use of the amended determinate sentencing law at resentencing violated the prohibition against ex post facto laws and violated due process. She acknowledges our Supreme Court in *Sandoval* rejected similar claims.⁵

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.

imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.”

⁵ In view of our conclusion that appellant was not sentenced under the sentencing scheme found unconstitutional in *Cunningham* and that the trial court did not abuse its discretion in sentencing appellant to the upper term, her claim of ineffective assistance of counsel must necessarily fail. (See *People v. Maury* (2003) 30 Cal.4th 342, 419.)